

85-20-701. United States Fish and Wildlife Service-Montana compact ratified. The compact entered into by the State of Montana and the United States Fish and Wildlife Service and filed with the secretary of state of the State of Montana under the provisions of 85-2-702 on March 26, 1997, is ratified. The compact is as follows:

WATER RIGHTS COMPACT
STATE OF MONTANA
UNITED STATES OF AMERICA, FISH AND WILDLIFE SERVICE

This Compact is entered into by the State of Montana and the United States of America to settle for all time any and all claims existing on the effective date of the Compact to water for Black Coulee and Benton Lake National Wildlife Refuges administered by the U.S. Fish and Wildlife Service within the State of Montana.

RECITALS

WHEREAS, in 1979 the United States filed in the United States District Court for the District of Montana several actions to adjudicate, inter alia, its rights to water with respect to Black Coulee National Wildlife Refuge, see United States v. Ageson, No. CV-79-21-GF;

WHEREAS, the State of Montana, in 1979 pursuant to Title 85, Chapter 2 of the Montana Code Annotated, commenced a general adjudication of the rights to the use of water within the State of Montana including all federal reserved and appropriative water rights;

WHEREAS, 85-2-703, MCA, provides that the state may negotiate settlement of claims by the federal government to non-Indian reserved waters within the State of Montana;

WHEREAS, the United States wishes to quantify and have decreed the amount of water necessary to fulfill the purposes of Benton Lake and Black Coulee National Wildlife Refuges, in the State of Montana;

WHEREAS, the United States, in quantifying its reserved water rights recognizes the need to accommodate the interests of the state and its citizens by providing for the development and use of water in the vicinity of the Fish and Wildlife Service Refuges to the extent that it is possible to do so without materially affecting the rights and interests of the United States;

WHEREAS, the United States Attorney General, or a duly designated official of the United States Department of Justice, has authority to execute this Compact on behalf of the United States pursuant to the authority to settle litigation contained in 28 U.S.C. § 516-17 (1968);

WHEREAS, The Secretary of the Interior, or a duly designated official of the United States Department of the Interior, has authority to execute this Compact on behalf of the United States Department of Interior pursuant to 43 U.S.C. § 1457 (1986, Supp. 1992);

NOW THEREFORE, the State of Montana and the United States agree as follows:

ARTICLE I

DEFINITIONS

For purposes of this Compact only, the following definitions shall apply:

- (1) "Abstract" means the copy of the document entitled "Abstract of U.S. Fish and Wildlife Service Water Rights" referenced in this Compact as Appendix 1.
- (2) "Benton Lake National Wildlife Refuge" means those lands located in Montana that were withdrawn and reserved by Executive Order No. 5228 of November 21, 1929.
- (3) "Black Coulee National Wildlife Refuge" means those lands and interests in lands located in Montana that were acquired pursuant to, or withdrawn and reserved by Executive Order 7801 of January 28, 1938.
- (4) "Department" means the Montana Department of Natural Resources and Conservation or its successor.
- (5) "Effective date of this Compact" means the date of the ratification of the Compact by the Montana legislature, written approval by the United States Department of the Interior, or written approval by the United States Department of Justice, whichever is later.
- (6) "Groundwater" means water that is beneath the ground surface.
- (7) "Non-consumptive" means a water right considered to be non-consumptive by the decree, permit or law authorizing the use, because it results in no depletion of water from the source.
- (8) "Parties" means the State of Montana and the United States.
- (9) "Person" means an individual, association, partnership, corporation, state agency, political subdivision, or any other entity, but does not include the United States.
- (10) "Recognized under state law" when referring to a water right or use means a water right or use protected by state law, but does not include state recognition of a federal or tribal reserved water right.
- (11) "State" means the State of Montana and all officers, agents, departments, and political subdivisions thereof. Unless otherwise indicated, for purposes of notification or

consent, "state" means the Director of the Montana Department of Natural Resources and Conservation or his or her designee.

(12) "United States" means the federal government and all officers, agencies, departments and political subdivisions thereof. Unless otherwise indicated, for purposes of notification or consent other than service in litigation, "United States" means the Secretary of the Department of the Interior, or his or her designees.

ARTICLE II

WATER RIGHT

The parties agree that the following water rights are in settlement of the reserved water rights of the United States for the Refuges described. The parties to this agreement recognize that the water rights described in this Compact are junior to any tribal water rights with a priority date before the effective date of the Compact, including aboriginal rights, if any, in the basins affected. All reserved water rights described in this Article are subject to Article IV, section A of this Compact.

A. Benton Lake National Wildlife Refuge

1. Quantification: The United States shall have the right to water from the following sources where they occur on the Refuge:

a. Consumptive Use: The United States has a reserved water right to 2 acre-feet per year diverted at a maximum rate of 45 gpm from groundwater beneath the Benton Lake National Wildlife Refuge.

b. Natural Flow: The United States has a reserved water right to the natural flow in the Lake Creek drainage including the unnamed tributaries to Benton lake where the drainage enters the Refuge in the amount of the natural flow remaining after satisfaction of the following rights:

(1) all rights recognized under state law with a priority date prior to the effective date of this Compact;

(2) any rights for stock watering ponds with a priority date after the effective date of this Compact and a maximum capacity of the impoundment or pit of less than 15 acre-feet and an appropriation of less than 30 acre-feet per year from a source other than a perennial flowing stream; and

(3) any right to appropriate groundwater with a priority date after the effective date of this Compact by means of a well or developed spring with a maximum appropriation of 35 gallons per minute or less that does not exceed a total appropriation of 10 acre-feet per year.

2. a. Priority Date: The United States has a priority date of November 21, 1929, for the reserved water rights described in this Compact for Benton Lake National Wildlife Refuge.

b. Subordination: The natural flow water right is subordinate to:

(1) any use recognized under state law with a priority date before the effective date of this Compact;

(2) any use considered non-consumptive as defined by this Compact;

(3) stock watering ponds with a priority date after the effective date of this Compact and with a maximum capacity of the impoundment or pit of less than 15 acre-feet and an appropriation of less than 30 acre-feet per year from a source other than a perennial flowing stream; and

(4) appropriation of groundwater with a priority date after the effective date of this Compact by means of a well or developed spring with a maximum appropriation of 35 gallons per minute or less that does not exceed a total appropriation of 10 acre-feet per year.

3. Period of Use: The period of use of this water right shall be from January 1 through December 31 of each year.

4. Points and means of diversion: Any point on the Refuge and by any means subject to the terms of this Compact.

5. Purposes: The United States right to water may be used for the following purposes, provided that, subject to the limitations set forth in Article III. section E., the United States may change the use of water identified for consumptive use.

a. Consumptive Use: The United States water right to groundwater shall be used at the Refuge headquarters for the purposes of the Refuge.

b. Natural Flow: The United States water right to natural flow shall be used on the Benton Lake National Wildlife Refuge for wildlife habitat maintenance and enhancement.

B. Black Coulee National Wildlife Refuge

1. Quantification: The United States shall have the right to water from the following sources where they occur on Black Coulee National Wildlife Refuge:

2. Natural Flow: The United States has a reserved water right for the natural flow in the Black Coulee drainage where the drainage enters the Refuge in the amount of the natural flow remaining after satisfaction of the following rights:

(1) all rights recognized under state law with a priority date prior to the effective date of this Compact;

(2) any rights for stock watering ponds with a priority date after the effective date of this Compact and a maximum capacity of the impoundment or pit of less than 15 acre-feet and an appropriation of less than 30 acre-feet per year from a source other than a perennial flowing stream; and

(3) any right to appropriate groundwater with a priority date after the effective date of this Compact by means of a well or developed spring with a maximum appropriation of 35 gallons per minute or less that does not exceed a total appropriation of 10 acre-feet per year.

3. a. Priority Date: The United States has a priority date of January 28, 1938 for the water rights described in this Compact for Black Coulee National Wildlife Refuge.

b. Subordination: The natural flow water right is subordinate to:

(1) any use recognized under state law with a priority date before the effective date of this Compact;

(2) any use considered non-consumptive as defined by this Compact;

(3) stock watering ponds with a priority date after the effective date of this Compact and with a maximum capacity of the impoundment or pit of less than 15 acre-feet and an appropriation of less than 30 acre-feet per year from a source other than a perennial flowing stream; and

(4) appropriation of groundwater with a priority date after the effective date of this Compact by means of a well or developed spring with a maximum appropriation of 35 gallons per minute or less that does not exceed a total appropriation of 10 acre-feet per year.

4. Period of Use: The period of use of this water right shall be from January 1 through December 31 of each year.

5. Points and means of diversion: any point on the Refuge and by any means subject to the terms of this Compact.

6. Purposes: The United States water right to natural flow shall be used on the Black Coulee National Wildlife Refuge for wildlife habitat maintenance and enhancement.

C. Emergency Fire Suppression

The use of water for emergency fire suppression benefits the public, and is necessary for the purposes of the various Fish and Wildlife Service refuges. The United States, may as

part of its reserved water right, divert water for fire suppression at all of the Fish and Wildlife Service Refuges as needed, and without a definition of the specific elements of a recordable water right. Use of water for fire suppression shall not be deemed an exercise of the United States' reserved water rights for consumptive use or a violation of its reserved water rights for natural flow.

ARTICLE III

IMPLEMENTATION

A. Basin Closure

1. In the following drainage basins upstream of the most downstream point on the Refuges for which a reserved water right is described by this Compact, the Department shall not process or grant an application for a permit to appropriate or to reserve water for consumptive use after the effective date of this Compact, provided that, the Department may issue certificates of water right for appropriation of groundwater by means of a well or developed spring with a maximum appropriation of 35 gallons per minute or less that does not exceed a total appropriation of 10 acre-feet per year, and permits for stock watering ponds with a maximum capacity of the impoundment or pit of less than 15 acre-feet and an appropriation of less than 30 acre-feet per year from a source other than a perennial flowing stream:

Benton Lake National Wildlife Refuge:

Lake Creek Watershed including the unnamed tributaries of Benton Lake

Black Coulee National Wildlife Refuge:

Black Coulee Watershed

2. If a temporary or permanent basin closure is enacted under state law for a drainage basin or subbasin for which future consumptive water use is limited under this Compact, the most restrictive measures applicable to consumptive use of surface or groundwater shall control.

3. Within 180 days following the effective date of this Compact, the Department shall mail notice of the basin closure to every person or public agency of record with a claim of water right or permit in the source subject to closure.

B. Enforcement of Water Right

1. The United States, the state, or a holder of a water right recognized under state law, may petition a state or federal court of competent jurisdiction for relief when a controversy arises between the United States' reserved water right described by this Compact, and a holder of a water right recognized under state law. Resolution of the

controversy shall be governed by the terms of this Compact where applicable, or to the extent not applicable, by applicable state or federal law.

2. The United States agrees that a water commissioner appointed by a state or federal court of competent jurisdiction, or other official authorized by future changes in law, may enter a refuge for which a water right is described in this Compact for the purpose of data collection, including the collection of information necessary for water distribution on or off the refuge, and to inspect structures for the diversion and measurement of water described in this Compact for consumptive use and for the measurement of natural flow. The terms of entry shall be as specified in an order of a state or federal court of competent jurisdiction.

3. The Department may enter a federal enclave for which a reserved water right is described in this Compact, at a reasonable hour of the day, for the purposes of data collection on water diversion and stream flow or inspection of devices maintained by the United States pursuant to this Compact. The Department shall notify the United States by certified mail or in person, at least 24 hours prior to entry.

4. The United States may request an investigation by the Department of a diversion located upstream of the reserved portion of a stream for which a reserved water right is described in this Compact. The Department may investigate. If an investigation occurs, the United States may accompany the Department.

5. The United States shall maintain structures, including wellhead equipment and casing, for the diversion and measurement of water authorized for consumptive use by this Compact. The United States shall maintain the devices it deems necessary for enforcement of its reserved water right for natural flow described in this Compact.

6. A person who violates or refuses or neglects to comply with the provisions of this Compact, an order of the Department pursuant to this Compact, or an action by the Bureau pursuant to this Compact is subject to the penalties provided by state law.

C. Use of Water Right

The rights of the United States described in this agreement are federal reserved water rights. Non-use of all or a part of the federal reserved water rights described in this Compact shall not constitute abandonment of the right. The federal reserved water rights described in this Compact need not be applied to a use deemed beneficial under state law, but shall be restricted to uses necessary to fulfill the purposes of the associated reserved land described in Article II, sections A.5. and B.5 and C.

D. Location of Natural Flow Rights

The United States' reserved water rights for natural flow apply to the portion of the streams specified in this Compact that flow over or form the boundary to land administered by the Fish and Wildlife Service.

E. Change in Use

1. Natural flow: Reserved water rights specified in this Compact for natural flow shall not be subject to change to any other use, provided that: the emergency use of water for fire suppression as provided for in Article II.C. shall not be deemed a change or alteration in use, or violation of a reserved water right for natural flow.

2. Consumptive uses: The United States may take action affecting the use of its consumptive use water rights provided that:

(1) the action shall be in fulfillment of the purposes of the refuge described in Article II, sections A.5;

(2) the total use shall not exceed the amount described in this Compact; and

(3) the action shall not adversely affect a water right that is recognized under state law.

3. Reporting by the United States: For any action affecting the use of a consumptive right whether or not such action is deemed a change in use, the United States agrees to provide the following information to the Department:

a. Well log: For a use that includes the drilling of a well or enlargement of an existing wellbore, the United States agrees to provide a well log to the state within 60 days of the completion of the well.

b. Emergency Use: Within 60 days after the commencement of a temporary emergency use for fire suppression described in Article II, Section C. of this Compact, the United States agrees to notify the state of the use to which the water was put, the dates of use, and the estimated amount of water used.

c. Annual Report: Between April 1 and May 1 of each year, the United States agrees to provide the Department with a report on:

(1) actions during the preceding year affecting the use of a consumptive use right described in this Compact;

(2) the initiation of new uses that were completed during the preceding year; and

(3) any data and documents generated or received by the Fish and Wildlife Service during the preceding year on measurement of stream flow on a stream with a natural flow water right set forth in this Compact.

4. Reporting by the State: Between December 1 and December 31 of each year, the Department shall provide the United States with a report of:

(1) changes in use during the preceding year, as defined by state law, of water rights upstream of or within the boundaries of reserved land for which a reserved water right is described in this Compact;

(2) any data and documents generated by the Department during the preceding year on the measurement of streamflows, diversions and well use on or tributary to a stream for which a water right for natural flow is described in this Compact;

(3) any certificate of water right issued during the preceding year for appropriation of groundwater; and

(4) any permit issued during the preceding year for a stock watering pond.

ARTICLE IV

GENERAL PROVISIONS

A. No Effect on Tribal Rights or Other Federal Reserved Water Rights

1. The relationship between the water rights of the Fish and Wildlife Service described herein and any rights to water of an Indian Tribe in Montana, or of any federally derived water right of an individual, or of the United States on behalf of such tribe or individual shall be determined by the rule of priority. The parties to this agreement recognize that the water rights described in this Compact are junior to any tribal water rights with a priority date before the effective date of the Compact, including aboriginal rights, if any, in the basins affected.

2. Nothing in this Compact may be construed or interpreted in any manner to establish the nature, extent or manner of administration of the rights to water of any other federal agency or federal lands in Montana other than those of the Fish and Wildlife Service.

3. Nothing in this Compact may be construed or interpreted in any manner to establish the nature, extent or manner of administration of the rights to water of any Indian Tribes and tribal members in Montana.

4. Nothing in this Compact is otherwise intended to conflict with or abrogate a right or claim of any Indian Tribe regarding boundaries or property interests in the State of Montana.

B. State Water Rights

Nothing in this Compact may limit the exclusive authority of the state, including the authority of a water commissioner authorized by state law, to administer all current and future water rights recognized under state law within and upstream of the reserved land covered by this Compact, provided that in administration of those water rights in which

the United States has an interest, such authority is limited to that granted under federal law.

C. Abstract

Concurrent with this Compact, the parties have prepared an Abstract, a copy of which is referenced as Appendix 1, which is a specific listing of all of the United States' water rights for Benton Lake and Black Coulee National Wildlife Refuges, that are described in this Compact and quantified in accordance with this Compact. The parties prepared the Abstract to comply with the requirements for a final decree as set forth in 85-2-234, MCA, and in an effort to assist the state courts in the process of entering decrees accurately and comprehensively reflecting the rights described in this Compact. The rights specified in the Abstract are subject to the terms of this Compact. In the event of a discrepancy between a right listed in the Abstract and that same right as quantified in accordance with Articles II and III of this Compact, the parties intend that the quantification in accordance with Articles II and III of this Compact shall be reflected in a final decree.

D. General Disclaimers

Nothing in this Compact may be construed or interpreted:

1. as a precedent for the litigation of reserved water rights or the interpretation or administration of future compacts between the United States and the State; or of the United States and any other state;
2. as a waiver by the United States of its right under state law to raise objections in state court to individual water rights claimed pursuant to the state Water Use Act, Title 85, of the Montana Code Annotated, in the basins affected by this Compact; or any right to raise objections in an appropriate forum to individual water rights subject to a provisional permit under the state Water Use Act, Title 85, of the Montana Code Annotated, in the basins affected by this Compact;
3. as a waiver by the United States of its right to seek relief from a conflicting water use not entitled to protection under the terms of this Compact;
4. to establish a precedent for other agreements between the state and the United States or an Indian tribe;
5. to determine the relative rights, inter sese, of persons using water under the authority of state law or to limit the rights of the parties or a person to litigate an issue not resolved by this Compact;
6. to create or deny substantive rights through headings or captions used in this Compact;

7. to expand or restrict any waiver of sovereign immunity existing pursuant to federal law as of the effective date of this Compact;
8. to affect the right of the state to seek fees or reimbursement for costs or the right of the United States to contest the imposition of such fees or costs, pursuant to a ruling by a state or federal court of competent jurisdiction or Act of Congress;
9. to affect in any manner the entitlement to or quantification of other federal water rights. This Compact is only binding on the United States with regard to the water rights of the Fish and Wildlife Service, and does not affect the water rights of any other federal agency that is not a successor in interest to the water rights subject to this Compact;
10. to prevent the United States from constructing or modifying an outlet to an impoundment at a Refuge in compliance with all applicable law;
11. to prevent the United States from seeking a permit to appropriate water under state law from a source not closed to new permits by this Compact or any other law.

E. Reservation of Rights

The parties expressly reserve all rights not granted, described or relinquished in this Compact.

F. Severability

The provisions of this Compact are not severable, provided that for the purposes of Sec. 85-2-702(3), MCA, the water rights described in this Compact for each Fish and Wildlife Service Refuge shall be considered as separate Compacts.

G. Multiple Originals

This Compact is executed in quintuplicate. Each of the five (5) Compacts bearing original signatures shall be deemed an original.

H. Notice

Unless otherwise specifically provided for in this Compact, service of notice required hereunder, except service in litigation, shall be:

1. State: Upon the Director of the Department and such other officials as he or she may designate in writing.
2. United States: Upon the Secretary of the Interior and such other officials as he or she may designate in writing.

ARTICLE V

FINALITY OF COMPACT AND DISMISSAL OF PENDING CASES

A. Binding Effect

1. The effective date of this Compact is the date of the ratification of this Compact by the Montana legislature, written approval by the United States Department of the Interior, or written approval by the United States Department of Justice, whichever occurs later. Once effective, all of the provisions of this Compact shall be binding on:

- a. The State and a person or entity of any nature whatsoever using, claiming or in any manner asserting a right under the authority of the State to the use of water; and
- b. Except as otherwise provided in Article IV, section A., the United States, a person or entity of any nature whatsoever using, claiming, or in any manner asserting a right under the authority of the United States to the use of water.

2. Following the effective date, this Compact shall not be modified without the consent of both parties. Either party may seek enforcement of this Compact in a court of competent jurisdiction. Attempt to unilaterally modify this Compact by either party shall render this Compact voidable at the election of the other party.

3. On approval of this Compact by a state or federal court of competent jurisdiction and entry of a decree by such court confirming the rights described herein, this Compact and such rights are binding on all persons bound by the final order of the court.

4. If an objection to this Compact is sustained pursuant to 85-2-702(3), MCA, this Compact shall be voidable by action of and without prejudice to either party.

B. Disposition of Actions

Subject to the following stipulations and within one hundred eighty (180) days of the effective date, the parties shall submit this Compact to an appropriate state court or courts having jurisdiction over this matter in an action commenced pursuant to 43 U.S.C. § 666, for approval in accordance with state law and for the incorporation of the reserved water rights described in this Compact into a decree or decrees entered therein. The parties understand and agree that the submission of this Compact to a state court or courts, as provided for in this Compact, is solely to comply with the provisions of 85-2-702(3), MCA, and does not expand the jurisdiction of the state court or expand in any manner the waiver of sovereign immunity of the United States in the McCarran Amendment, 43 U.S.C. § 666 or other provision of federal law.

1. Dismissal of Filed Claims: At the time the state courts approve the reserved water rights described in this Compact and enter a decree or decrees confirming the rights described herein, such courts shall dismiss, with prejudice, all of the water right claims specified in Appendix 2 for Benton Lake National Wildlife Refuge and Appendix 3 for Black Coulee National Wildlife Refuge to this Compact. If this Compact fails approval or

a reserved water right described herein is not confirmed, the specified claims shall not be dismissed.

2. Disposition of Federal Suits: Within ninety (90) days of the issuance of a final decree or decrees by the state courts approving this Compact and confirming the reserved water rights described herein, and the completion of any direct appeals therefrom or the expiration of the time for filing such appeal, the parties shall execute and file joint motions pursuant to Rule 41(a) Fed. R. Civ. P. to dismiss with prejudice any claims made by the United States for the Fish and Wildlife Service Refuges described in this Compact in federal court. This Compact may be filed as a consent decree in those federal suits, only if, prior to the dismissal of the federal suits as provided in this Article, it is finally determined in a judgement binding on the State of Montana that the state courts lack jurisdiction over some or all of the reserved water rights described in this Compact. Within one year of such judgment the United States agrees to commence such additional proceedings in the federal district court for the District of Montana as may be necessary to judicially confirm the reserved water rights described herein which are not included within an existing action.

3. Continuation of Negotiations: The parties were unable to finalize agreement on quantification of the water rights for: Red Rocks National Wildlife Refuge and Wilderness Area; the National Bison Range; Bowdoin National Wildlife Area; and Charles M. Russell and UL Bend National Wildlife Refuges and UL Bend Wilderness Area, prior to the effective date of this Compact. The parties agree to continue to pursue, in good faith, quantification of water rights for these areas. In the event the parties are unable to agree on quantification, the United States retains its right to have the quantity of any reserved water right for these areas adjudicated in a state or federal court of competent jurisdiction.

C. Settlement of Claims

The parties intend that the water rights described in this Compact are in full and final settlement of the water right claims for the reserved land described in this Compact and administered by the Fish and Wildlife Service in Montana on the effective date of this Compact. Pursuant to this settlement, the United States hereby and in full settlement of any and all claims filed by the United States or which could have been filed by the United States for Black Coulee and Benton Lake National Wildlife Refuges, relinquishes forever on the effective date of this Compact all said claims to water within the State of Montana for Black Coulee and Benton Lake National Wildlife Refuges. The state agrees to recognize the reserved water rights described and quantified herein, and shall, except as expressly provided for herein, treat them in the same manner as a water right recognized by the state.

D. The parties agree to defend the provisions and purposes of this Compact from all challenges and attacks.

IN WITNESS WHEREOF the representatives of the State of Montana and the United States have signed this Compact on the ____ day of _____, 19__.